Recent Trends in Professional Liability Cases

DURING THE PAST YEAR in one metropolitan county, eighteen malpractice cases were won, six were lost, three are awaiting a new trial and nine were settled. The losses totalled $238,300. Reports from lawyers who tried the cases, and from jurors who heard them, reveal factors which may influence a jury.

¶ Many jurors have great respect for well-trained and devoted physicians.

¶ Jurors consider themselves and most of their fellow men to be honest and expect others to be.

¶ Well-kept, written records are impressive.

¶ Honest mistakes, when admitted, can be excused, but attempts to hide or cover up or change records without explanation arouse distrust.

¶ Jurors take their duties seriously and feel that they should be trusted and have things explained to them in language they can understand.

¶ Indications that a physician is sympathetic and considerate with his patients weighs heavily in his favor.

A review of the facts developed in some of the cases that were decided may serve to illustrate precautions to be taken on things to be avoided.

Malpractice Insurance Contracts

During the past year, the members of a hospital medical staff in California were sued by a physician whose surgical privileges had been revoked. The plaintiff physician alleged that he had been slandered and libeled by the reasons given by the staff members for their refusal to renew his privileges. The plaintiff was not successful in his action. This case raised some practical questions regarding whose responsibility it is to defend and indemnify staff physicians for their acts in that capacity. Those physicians who are serving on hospital staff committees should assure themselves that their malpractice insurance carrier or the hospital carrier or the basic policy of the hospital will provide for the defense of their official acts and decisions as members of that committee.

Physicians who hold public office such as the office of coroner should assure themselves that their malpractice insurance contract provides for their defense and indemnification while acting both as a private physician and as a public officer. A case in Missouri held that the physician's malpractice policy did not cover him for liability arising out of his medical actions as a coroner.

From the Medical Review and Advisory Board, California Medical Association.

Injuries from Drugs and Other Therapy

The side effects occurring as a result of the taking of prescribed drugs, of diagnostic procedures, or of x-ray and other kinds of therapy are sometimes harmful. Physicians may be held responsible for injuries that might be expected and avoided which are caused by drugs or by treatment.

A $56,000 verdict was returned against a physician who treated a 48-year-old patient with mycifardin (neomycin), with the result that he became afflicted with deafness and tinnitus. There were indications that the plaintiff had intrinsic renal disease. In such cases, it was alleged, medical literature indicates that this antibiotic should be used only in extreme emergency. At the trial, the defendant physician conceded that this case was not an emergency. The question of whether the physician exercised reasonable care under the circumstances was submitted to the jury.

In general, the use of drugs or procedures which might produce harmful side effects should not be prescribed lightly—only when medically necessary. Statements indicating that certain drugs or procedures are perfectly safe may be construed to be a warranty of safe treatment. That should be avoided.

In the poliomyelitis cases against Cutter Laboratories, a manufacturer of drugs and medicines, the trial court assumed that there had been a sale of the vaccine and that it was subject to the implied warranties imposed on some products by the Uniform Sales Act. On appeal, Cutter Laboratories plus several amici curiae (friends of the court) are contending that the use of biologicals by a physician is a professional service, not a sale, and that neither the manufacturer nor the physician is a "warranter of cures."

Failure to Follow Up

Abandonment and failure to follow up continue to be the basis of some malpractice claims and suits. Personal pique is often the underlying cause for some cases of abandonment. The rule for physicians: Be angered, but don't hang up!

If a physician records a note that a person should have follow-up x-ray or laboratory work for a suspected fracture, tuberculosis, or for any other reason —he should establish some means to remind himself or the patient to do the follow-up. Bad results which occur when there was no follow-up after one had been noted as proper, have been embarrassing. If the patient is not aware of your note that a follow-up is needed, the physician is in an unhappy position.

Foreign Bodies

The incidents in which a foreign body is left in a

wound seem to be decreasing. The U. S. Court of Appeals for the District of Columbia in December, 1958, held "that everybody knows without being told by an expert that it is not approved surgical practice to leave a small pad of gauze or a few threads therefrom or any other foreign nonabsorbable substance in a patient's body."

A Canadian physician recently reported in Scotland to a joint meeting of the Canadian and British Medical Associations as follows:

"In the last six years in Canada alone surgeons had left 19 needles, 35 sponges, five pairs of forceps and 17 miscellaneous objects in the bodies of patients during operations.

"The layman finds it hard to understand how forceps could be left behind inside a body, but there are several operations where the stomach is packed full of instruments."

Careless Comments

Careless or thoughtless comments by a physician to a patient or relative may be introduced in evidence for the jury to consider in their deliberations to determine that the degree of care used was that standard of care ordinarily exercised by other doctors of good standing in that community. Such comments as "this was not my day" or "I goofed" or "I should have stayed in bed" can be considered along with other evidence in determining whether or not proper standard of care was administered.

Freedom from "Mental Disturbance"

Freedom from mental disturbance is a personal interest that is protected by the law. A New York appellate court in 1958, considered a case in which a patient went to a radiologist for x-ray treatments of bursitis in her right shoulder and received x-ray burns in the course of therapy administered by the defendant physician. She was informed by a dermatologist that she should have the tissue examined every six months since cancer might possibly develop. It was alleged that as a result of the statement, she developed severe cancerophobia. She was entitled to recover for mental anguish resulting therefrom, according to the court. The facts showed that after seven x-ray treatments, the skin blistered, became raw and scabs formed which lasted from several months to several years. The action was brought on the grounds of improper and excessive x-ray treatments. There was medical testimony both pro and con. In proof of damages, the testimony of a neuropsychiatrist was introduced to the effect that the plaintiff was suffering from a severe cancerophobia and might have permanent symptoms of anxiety. An award of $25,000 was made by the jury, $15,000 of which was based on the mental anguish flowing from the cancerophobia. In examining this decision, the appellate court held that freedom from mental disturbance is a protected interest. This mental anguish arose as a result of the injury inflicted by the defendants. The answer to the question how far this doctrine will extend or at what point one ceases to be responsible for mental anguish, the court said, must be "dictated by public policy or common sense."

The tendency to sue physicians for liability based on other than negligent acts continues. In such cases, it is not always necessary for the plaintiff to produce a medical expert to establish the prevailing medical standard of care.

Breach of Contract

It was found that a physician agreed to remove some blemishes from one of his patients. The treatment failed to accomplish its purpose. The patient sued for breach of contract and was successful with his claim. Even though the physician denied that he made any contract to cure, the jury awarded a $4,000 verdict. On appeal, the case was reversed and a new trial ordered. During the second trial, the case was settled for $1,250. The physician's malpractice insurance carrier denied liability under its contract and the physician sued the company. The court held that the policy only insured against "malpractice error or mistake" and not against damages arising out of breach of contract.

In another case decided in March of 1957, suit was brought for breach of contract. The jury had to decide whether the parties had agreed that a cesarean section was to be performed at the time of delivery. The jury also had to decide whether or not the damages which the plaintiff received were the result of the failure to perform cesarean section. The plaintiff had a history of two previous stillborns and had insisted that she be delivered on this occasion by cesarean section. The physician did not use the operation and the baby was stillborn. In an action for breach of contract, the jury returned a verdict for $5,000, which included recovery for grief and suffering. On appeal, the court held that, under the modern view, where a contract deals with personal rights and emotions, such as it does in the breach of contract to marry and in the breach of a contract such as in this case, damages may be awarded for grief.

Assault and Battery

Cases continue to arise in which it is alleged that the surgeon performed an operation which was not authorized. In a California case that was reviewed by the appellate court, the plaintiff alleged that without "her knowledge and consent" the defendant operated on her in an "unnecessary, careless and negligent manner." Both lack of consent and neg-

ligence were relied upon in this case. The court held that it was a case involving technical battery. A verdict of $75,000 was affirmed. The plaintiff was operated on for prolapse of the uterus, for a rectocele and a cystocele. The surgeon removed the uterus, the Fallopian tubes, and her one remaining ovary. To such excisions, the plaintiff did not consent. Hospital records showed that pathological examination of the tissues revealed them to be normal. There was evidence from which the jury could conclude that it is not accepted surgical practice to remove such organs when there are no pathological abnormalities.

Dr. Leo J. Adelstein of Los Angeles has pointed out* that if the physician agrees to take over the treatment and observation of a patient, an express or implied contract is entered into. A written contract is seldom, if ever, used when furnishing most medical services. However, when delicate, complicated and hazardous procedures are to be used, it is recommended that a written consent or memorandum be obtained. It has been held that the contract relationship between a physician and patient imposes a duty on the physician to use the highest degree of good faith in dealing with his patient. This includes the duty to make a full disclosure of the surgical risk, hazard and danger, if any, in order that the patient may make an enlightened consent to the operation or procedure. Technical language should be avoided unless it is quite well understood.

Howard Hassard, the general counsel of the California Medical Association, has stated:

"Some physicians have a tendency to poke fun at the concept of pre-enlightenment of the patient on the ground that if you undertake to tell some of the story you must tell it all, and that if you explain all conceivable consequences of any course of action, you either devote an afternoon to the project or scare the patient to death, or both. While the validity of the point is recognized, the fact remains that the public today will not accept secrecy or mysticism and will get its information where it can, and if the information is inadequate, will draw erroneous conclusions. It seems to me that it is possible in medicine to reach a technique in which adequate explanation is given without going to extremes and without impairing the patient's confidence."

*Los Angeles County Medical Association *Bulletin*, July 4, 1957.

Tape Recordings

Some physicians have reported that offhand preliminary comments made by them have been recorded without their knowledge. When disputes develop about treatment or a lawsuit develops to recover damages for an injury, a physician should be most circumspect about what he says. If proper questions should be answered, the physician may suggest that they be put in writing or that he will consult his records to refresh his recollection. He ought not be too quick to give an opinion. It is wise to say, "I don't recall offhand, but I will find out."

Miscellaneous Costly Reminders

Current malpractice case records reveal several instances in which pelvic and abdominal operations on women disclosed an undiagnosed pregnancy or during which there occurred a perforation of the colon, or femoral nerve paralysis, or severing of the common bile duct and, in one instance, vesicovaginal fistula. These cases have cost $18,750, $25,000, $2,000, $5,000 and $15,000.

Also reported during the year, was an instance of vein stripping being performed on the wrong leg and the removal of a short arm cast in such a manner that permanent, unsightly scars were left on the patient's arm and hand.